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Delmar Carter v. Provo City et al : Brief of Defendants

Utah Supreme Court

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In the Supreme Court of the State of Utah

DELMAR CARTER,

Plaintiff,

vs.

PROVO CITY, a municipal corporation; HAROLD E. VAN WAGENEN, Mayor; FRANK KILLPACK, GEORGE E. COLLARD, G. MARION HINCKLEY, STELLA H. OAKES, ROY PASSEY, and PHILLIP PERLMAN, Members of the City Council; E. EARL UDALL, City Manager and Acting Director of Finance of Provo City; and I. G. BENCH, City Recorder of Provo City,

Defendants.

CIVIL NO. 8559

BRIEF OF DEFENDANTS

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FACTS AND ISSUES

The facts alleged in plaintiff's petition and set out in plaintiff's brief are not controverted. Provo City has adopted a "Home-Rule Charter" pursuant to Article XI, Section 5, of the Constitution of Utah, and has commenced proceedings to establish Sewer Improvement District No. 37 and

proposes to contract for the special improvements, for the construction of which the district has been organized, and to levy special taxes or assessments to finance the same as provided by Sections 10-7-21 to 10-7-50, Utah Code Annotated, 1953. The City further proposes to issue special improvement district bonds against and in anticipation of the said special tax or assessment as provided by Section 10-7-63, Utah Code Annotated, 1953. It is the contention of the defendants that these general statutes have been adopted by reference as a part of the Council-Manager Charter of Provo, and particularly Section 5-1 thereof, and that these are specific provisions relating to special improvement bonds which control over the general provisions of Section 6-16 of the Charter relating in general to the execution of contracts for public improvements.

It is the further contention of the defendants that even if all of these statutory provisions have not been adopted and are not controlling, nevertheless, the City can, and upon direction of the Court, will comply with all applicable provisions of the City Charter, and should be given an opportunity to do so, and for that reason no permanent writ should be issued herein.

The defendants upon mature deliberation agree with Point I set out in plaintiff's brief that Provo City, as a charter city under Article XI, Section 5, of the Constitution of Utah, has the right to adopt the general laws of the State providing for the establishment of special improvements or that it may establish different procedures for the construction of special improvements. The defendants also agree with Point III of plaintiff's brief to the effect that the construction of special improvements or the establishment of special improvement districts is not a "state affair", but

is a "local or municipal affair" and is therefore a proper subject to be regulated by the provisions of the Provo City Home-Rule Charter. The defendants therefore concede the correctness of Point I and Point III of the argument advanced in plaintiff's brief.

Defendants feel that fairness to the Court requires that it set out briefly the matters which constrain them to make these concessions. Briefly, these considerations are the provision of Section 5, Article XI, of the Constitution that a home-rule charter when approved "shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith" and the further provision of said section that each city forming its charter under said section "shall have and is hereby granted the authority to exercise all powers relating to municipal affairs . . . . and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred." If the matter of the construction of strictly local improvements under the direction of the local municipal authorities, to be paid for or financed out of strictly local taxes or assessments levied on the local property benefited is not a matter or power relating to municipal affairs, it is very difficult to imagine what coud be construed to be a local municipal affair within the meaning of the Constitution. Any other construction would obviously defeat and nullify the clear intention of the framers of the home-rule provisions of the Constitution. It would force increasing centralization of governmental power rather than decentralization of governmental power, as is now recognized to be necessary for the preservation of democratic procedures

and principles. The defendants are also persuaded by the opinion of this Court cited by plaintiff in the case of

Wadsworth vs. Santaquin City
83 Utah 621, 28 Pac. 2d 161.

As is said by McQuillin on Municipal Corporations, Third Edition, Section 4.111:

> "The assessment and collection of assessments for local improvements is generally held to be a matter of purely municipal concern, so that a provision in a city charter in regard thereto prevails as against a general statute in case of conflict."

This view gains added strength, it must be confessed, from the particular provisions of Utah's constitutional home-rule provision (Article XI, Section 5) wherein it is said that

> "The power to be conferred upon cities by this section **shall** include the following:
>
> (a) "To levy, assess and collect taxes and borrow money within the limits prescribed by general law, **and to levy and collect special assessments for benefits conferred."**
>
> (b) "To furnish all local public services . . . ."
>
> (c) "To make local public improvements . . . ."

It must be noted that the Constitution specifically provides that the limits prescribed by general law are applicable to the levy of general taxes by charter cities, but the grant of authority to levy and collect special assessments is not so limited, and the differentiation must have been intended by the framers of the Constituoion. The question

as to whether statutory or charter procedure governs as to the issuance of municipal bonds is not here involved, as Section 5-1 of the Provo City Charter specifically adopts the general law of Utah relating to bonds of all kinds as a part of the Charter. In general, however, it should be observed that, in the absence of some special circumstance, the manner in which the power to borrow money and issue bonds is exercised is undoubtedly a matter of local self-government. For authority that charter provisions govern as regards the issuance of bonds, see, for example

Fritz vs. San Francisco
64 Pac. 566.

An example of the exception, because of special circumstances, is found in the Oklahoma case of

City of Tulsa vs. Dabney,
133 Okl. 54, 270 Pac. 1112.

In that case the Constitution of Oklahoma required all municipal bond issues to be approved by the **County Attorney** (a state officer) and, apparently for the protection of bond purchasers, the statutes required municipal bond issues to be approved by the State's Attorney General as Ex-officio Municipal Bond Commissioner, so that state officers might be liable on their official bonds for errors made by them in connection with municipal levies. Understandably under those special circumstances the Oklahoma Court held that municipal bond procedures were a state affair, governed by the State Statutes against which the State's Attorney General and the County Attorney must check the same. Those factors do not apply under the Utah Constitution and Laws and that case is quite distinguishable.

There is an issue between the parties as to Point II, set out in plaintiff's brief to the effect that the City Charter does not conform to the procedure established by the general Statutes of Utah relating to the construction of special improvements. That issue will be met under one or more of the points hereinafter set out to be discussed in this brief, and other issues are raised as shown by the following Statement of Points.

STATEMENT OF POINTS

POINT I

PROVO CITY CLEARLY HAS POWER TO CREATE SPECIAL IMPROVEMENT DISTRICTS FOR THE INSTALLATION OF SPECIAL LOCAL IMPROVEMENTS, TO LEVY SPECIAL ASSESSMENTS OR TAXES TO FINANCE THE SAME, AND TO ISSUE SPECIAL IMPROVEMENT DISTRICT BONDS IN ANTICIPATION OF THE COLLECTION OF SUCH ASSESSMENTS.

POINT II

THE GRANT OF SUCH POWER NECESSARILY IMPLIES THE GRANT OF MEANS TO GIVE IT EFFECT; SOME LEGAL AND PRACTICAL PROCEDURE FOR THE EXERCISE OF THAT POWER MUST EXIST.

POINT III

UNDER SECTION 5-1 OF THE PROVO CITY CHARTER, PROCEDURES FOR THE CONSTRUCTION OF SPECIAL IMPROVEMENTS AND FOR THEIR FINANCING BY SPECIAL IMPROVEMENT TAXES IS GOVERNED BY GENERAL LAW, AND CHARTER SECTION 6-16 IS NOT APPLICABLE.

POINT IV

WHETHER OR NOT SPECIAL IMPROVEMENT DISTRICT PROCEDURES ESTABLISHED BY GENERAL LAW ARE APPLICABLE, AND WHETHER OR NOT CHARTER SECTION 6-16 IS APPLICABLE, THE CITY CAN FULLY COMPLY WITH ALL LEGAL REQUIREMENTS AND SHOULD BE GIVEN AN OPPORTUNITY TO DO SO.

ARGUMENT

POINT I

PROVO CITY CLEARLY HAS POWER TO CREATE SPECIAL IMPROVEMENT DISTRICTS FOR THE INSTALLATION OF SPECIAL LOCAL IMPROVEMENTS, TO LEVY SPECIAL ASSESSMENTS OR TAXES TO FINANCE THE SAME, AND TO ISSUE SPECIAL IMPROVEMENT DISTRICT BONDS IN ANTICIPATION OF THE COLLECTION OF SUCH ASSESSMENTS.

It would seem that little need be said on this Point; indeed, except by implication, the plaintiff does not seem to contend that Provo City lacks the enumerated powers. However, plaintiff does seem to contend that there is no legal way in which the City under its present Charter can exercise that power, and this, of course, is tantamount to denial of the power itself. It is defendants' position that Provo City, pursuant to Article XI, Section 5, of the Constitution of Utah, as interpretated by this Court in the case of

Wadsworth vs. Santaquin City (supra)
83 Utah 621, 28 Pac. 2nd 161.

has authority direct from the Constitution and independent

of any legislative enactment to exercise the powers specified. The Constitution says that power conferred on a home-rule city "shall include" the power "to levy and collect special assessments for benefits conferred, to furnish all local public services" and "to make local public improvements." Obviously, the benefits conferred are the services rendered by the local improvements. A public sewer is the example **par excellence** of the manifest intention of the framers of the Constitution.

Moreover, Section 1-3 of the Council-Manager Charter of Provo City reads as follows:

> "The city shall have all powers of local self-government and home rule and all powers possible for a city to have under the constitution of the State of Utah. The city shall have all powers that now are, or hereafter may be granted to municipalities by the laws of the State of Utah. All such powers shall be exercised in the manner prescribed in this charter, or if not prescribed herein, in such manner as shall be provided by ordinance."

This grant of power pursuant to the home-rule provision of the Constitution could not be in broader terms and is clearly included in the Charter pursuant to the constitutional grant of "authority to exercise all powers relating to municipal affairs." Moreover, Chapter 7 of Title 15, Utah Code Annotated, 1953, in effect at the time of the adoption of the Charter, was a statutory grant of all of the enumerated powers, and clearly the framers of the Charter intended to pre-empt for Provo City that power which was granted to municipalities by the general laws.

Clearly and without controversy Provo City has the necessary power to proceed with the construction and pro-

per financing of the improvements included in Sewer District No. 37.

POINT II

THE GRANT OF SUCH POWER NECESSARILY IMPLIES THE GRANT OF MEANS TO GIVE IT EFFECT; SOME LEGAL AND PRACTICAL PROCEDURE FOR THE EXERCISE OF THAT POWER MUST EXIST.

Even less needs to be said on Point II. It is, of course, utterly absurd to think that the framers of our Constitution and the framers of the Provo City Charter should have intended that the City should have power to make special local improvements and levy special improvement taxes to defray the cost thereof, while every legal and practical means for the exercise of this power was withheld. This is utterly inconsistent and absurd, and obviously could not have been the purpose and intent of the home-rule provision of the Constitution or of the Charter. On the other hand, it is generally recognized that every municipality has the implied power and authority to do anything reasonably necessary or essential to give effect to powers expressly granted. See

McQuillin on Municipal Corporations,
Third Edition, Section 10.12.

See also

Nance vs. Mayflower Tavern, Inc.
106 Utah 517, 150 Pac. 2nd 773;

Salt Lake City vs. Bennion Gas and Oil Company
80 Utah 530, 15 Pac. 2nd 648;

Salt Lake City vs. Bennion
80 Utah 539, 15 Pac. 2nd 651;

American Fork City vs. Robinson
77 Utah 168, 292 Pac. 249;

Bohn vs. Salt Lake City
79 Utah 121, 8 Pac. 2nd 591;

Salt Lake City vs. Sutter
61 Utah 533, 216 Pac. 234.

Moreover, it is the rule that a municipality is not restricted to grants of power contained in its Charter, but all statutes applicable may be invoked.

McQuillin on Municipal Corporations,
Third Edition, Section 10.20.

As the City has power to make special improvements, it necessarily has the power to do whatever is required for the exercise of the specially granted power.

POINT III

UNDER SECTION 5-1 OF THE PROVO CITY CHARTER, PROCEDURES FOR THE CONSTRUCTION OF SPECIAL IMPROVEMENTS AND FOR THEIR FINANCING BY SPECIAL IMPROVEMENT TAXES IS GOVERNED BY GENERAL LAW, AND CHARTER SECTION 6-16 IS NOT APPLICABLE.

As we say, it would appear that the matters hereinbefore discussed under Points I and II are not seriously challenged by plaintiff. The real difference between the parties arises out of the contention of the plaintiff that Section 6-16 (Article VI, Section 16) of the Provo City Charter

applies to and governs the execution of contracts for construction of local public improvements. Section 6-16 of the Charter reads as follows:

> "No contract shall be executed for the acquisition of any property or the construction of any improvement or betterment **to be financed by the issuance of bonds** until the ordinance authorizing the issuance of such bonds shall have taken effect and any contract executed before such day shall be null and void." (Boldface supplied)

With this contention of the plaintiffs the defendants take issue. Section 5-1 of the Provo City Charter reads as follows:

> "Debt limitations, bond issues for public utilities, waterworks and sewers, local improvement district bonds, general obligation bonds, and other evidences of indebtedness, as well as bond elections, are governed and controlled by the state constitution and the general laws of the State of Utah. Such laws are hereby recognized as applicable to Provo City and become a part of this charter."

Defendants take the position that his provision authorizes them under the Charter to continue the procedure for special improvement district bonding, including the creation of special improvement districts and the levy of special improvement taxes, provided by the general laws (that is, the statutes) of the State of Utah in effect when the Charter was adopted. It is to be noted that by this provision of the Charter all of the general laws of Utah relating to "local improvement district bonds" are adopted by reference as an integral part of the Charter itself, thus manifesting the intention of the Provo Charter Commission and the

city electors, that special improvement district bonds shall continue to be issued in all respects as presently provided by general statute. As above noted, the parties are in agreement that this was within the rights and power of the City under the home-rule provision of the Constitution.

The general laws of Utah relating to special improvement bonds of all kinds are to be found generally in Sections 10-7-21 to 10-7-56 and 10-7-61 to 10-7-64, Utah Code Annotated, 1953. These same sections set out the authority and procedure for levying the special improvement taxes against which the bonds may be issued. Section 10-7-21, Utah Code Annotated, 1953, is a general grant of the right to make local improvements of the kind under consideration.

Section 10-7-22, Utah Code Annotated, 1953, provides that

> "to defray the cost and expense of such improvements or any of them, the governing body of cities and towns may levy and collect special taxes and assessments"

upon the property specially benefited by such improvements. Note that the statutes contemplate that the **taxes** will be levied to defray the costs of the improvements; it is the **taxes,** and **not the bonds,** which are primarily the method of financing such improvements. Again under the provisions of Section 10-7-42, Utah Code Annotated, 1953, reference is made to special taxes levied "to cover the cost of any public improvement herein authorized." And Section 10-7-61, Utah Code Annotated, 1953, relating to special improvement taxes reads as follows:

> "Limitation on use of special tax funds—In each case where a city or town levies or assesses any special or local tax for making and paying for any local im-

provement all money paid into the municipal treasury in payment of such special tax levies or assessments, or interest thereon, shall be deemed to be part of and constitute a fund for the payment of the costs and expense of making such local improvement, and for no other purpose."

It is apparent that the method of financing such special local improvements is by the levy of taxes, and not by the issuance of bonds.

The authority and procedure for the issuance of special sewer improvement bonds, as adopted by Section 5-1 of the Charter, is found in Section 10-7-63, Utah Code Annotated, 1953. It provides as follows:

> In any instance where a city or town may levy a special tax or assessment for the purpose of making or paying for any local improvement the City Auditor in cities having an auditor, the City Recorder in cities not having an auditor, or the Clerk of the Board of Town Trustees, upon being so directed by the governing body shall fifteen days after the levy of such tax or assessment becomes effective, issue warrants or bonds in payment of the cost and expense of such local improvements against the funds created by such special tax levy or assessment . . . . "

It must be observed that Section 10-7-63 and Section 10-7-61, hereinbefore quoted, were originally both part of the same act, namely, Chapter 1440, Session Laws of Utah, 1907. Considered as a whole, all of the statutes make it clear that the proceeds of the special tax levy are the primary source of financing of all special local improvements, and it is equally clear that special improvement district bonds are in the nature of tax anticipation bonds issued against and in anticipation of the collection of the special

improvement taxes which must be levied before such bonds can be issued. **The improvements are financed by the taxes, not by the bonds.**

As has been pointed out, **the tax must be levied before the bonds** can actually be issued. This is in very marked contrast with the situation prevailing when a city issues general obligation bonds to finance a public improvement, because in the case of general obligation bonds the improvements are financed by the bonds **before the tax is levied.** The bond ordinance and the bonds normally contain a covenant to levy **in the future** sufficient taxes to pay the bonds as they fall due or to provide a sinking fund for that purpose. The same is substantially true in the case of revenue bonds to finance a public improvement of a type which produces revenue. In the case of revenue bonds, the bonds are issued in advance as the primary source of financing the construction of an improvement, and a covenant is made that the plant when constructed will be operated on a revenue basis for an amount sufficient to discharge the obligation.

It is apparent that special improvement bonds are fundamentally different from municipal revenue bonds, and from muicipal general obligation bonds, in that special improvement bonds are issued only in anticipation of taxes already levied, which are the primary financing source, whereas general obligation and revenue bonds are the primary financing source and are not issued against any presently existing fund or tax levy. This difference is emphasized by the provision of Section 10-7-64, Utah Code Annotated, 1953, which specifically provides that no city or town shall be held liable for the payment of any special tax bond except to the extent of the funds created and received by

the special tax levies or assessments. Indeed, inasmuch as special improvement bonds are directed to be paid over a period of years, they could not represent a general obligation of the City and still be constitutional under the provisions of Article XIV, Section 3, of the Constitution of Utah, which has been properly construed to prohibit the obligating of revenues for future years without an election of the people.

State vs. Spring City
_____Utah,_____
260 Pac. 2nd 527.

In short, special improvement district bonds do not constitute an obligation of the city itself, and are not the primary source of financing public improvements as are general obligation and revenue bonds.

Unlike other kinds of municipal bonds, special improvement district bonds are in the nature of tax anticipation notes, and can be issued only after the tax against which they are drawn has been legally levied.

Moreover, there is nothing in the Provo City Charter, or in the general laws of Utah relating to local improvements which requires that bonds be issued against the special improvement taxes which finance the improvements involved. There is nothing in the Charter or in the law which would prohibit a city from making a contract for the construction of a sewer or other local improvement which by its terms would be payable exclusively out of the special improvement district taxes levied to defray the cost of such improvement. In other words, a city may legally make an installment contract with a contractor, with the contractor agreeing to look exclusively to the taxes for payment of

the construction contract price. Indeed, we believe that the Court will take judicial notice of the fact that many cities and towns in Utah have over the years made local improvements and paid for them without issuing any special improvement district bonds. The possibility of financing a local improvement without the issuance of bonds is well demonstrated by legislative history, for it appears that Section 10-7-63, Utah Code Annotated, 1953, which authorizes the issuance of special improvement district bonds, was first adopted in 1907, whereas the provisions for the creation of special improvement districts and the financing of special local improvements by such taxes dates back to a time prior to 1898. This also supports the defendants' position that special local improvements are financed by special local taxes, and not by special improvement district bonds, which may or may not be issued in anticipation of receipt of such taxes.

Turning now to the provisions of Charter Section 6-16, it must be noted that it by its terms applies only to contracts for improvements "to be financed by the issuance of bonds." Thus by its very terms Sections 6-16 has no application to contracts for improvements **to be financed by the levy of special improvement district taxes,** and it could not have been intended to be a bar or an impediment to the free exercise of the powers granted to the people of Provo City by the Constitution and the City Charter.

Finally, it will be recalled that by Charter Section 5-1 the general law of Utah relating to special improvement district bonds is incorporated in the Charter by reference. It is a specific provision relating to a very specific procedure. On the other hand, Section 6-16 of the Charter is general in its nature, and is included in the chapter of the Char-

ter relating to the Department of Finance, where all general provisions relating to municipal monetary control are included. If it should be considered that the provisions are in conflict, then under familiar rules of statutory construction the specific will be held to govern over the general provision, and the provisions relating to special improvement district bonds must be followed and the general provision relating to contracts considered as inapplicable.

A reading of the statutes relating to special improvement district bonds clearly indicates that the provisions for the levying of the special improvement taxes against which the bonds are issued is an essential and integral part of the prescribed bonding procedure, and that, while special taxes might be levied without any bonds being issued, bonds cannot be issued unless the taxes are levied. The proceedings not be issued unless thetaxes are levied. The proceedings for the creation of the special imporvement district and the levy of the taxes are an inseparable and indispensable part of the special bonding procedure. Thus if bonds are to be issued, the taxes must be levied as provided in the Statutes, Section 10-7-45, Utah Code Annotated, 1953, which as an integral part of the special taxing procedure prescribes in detail just how contracts for local improvements to be financed by special improvement district taxes are to be let, and further provides that the taxes may not be levied until the improvements serving the property levied upon have been completed. This again is a detailed and specialized procedure applying to the special case of improvement district bonds and taxes, and if there is any conflict, it must be held to control, while Charter Section 6-16 obviously was not intended by the charter framers to have application to this special case. Special provision was made for these

procedures, and they must govern over the general procedures provided for general financing.

POINT IV

WHETHER OR NOT SPECIAL IMPROVEMENT DISTRICT PROCEDURES ESTABLISHED BY GENERAL LAW ARE APPLICABLE, AND WHETHER OR NOT CHARTER SECTION 6-16 IS APPLICABLE, THE CITY CAN FULLY COMPLY WITH ALL LEGAL REQUIREMENTS AND SHOULD BE GIVEN AN OPPORTUNITY TO DO SO.

It is to be observed that while Provo City has obviously been granted power to make local improvements and to levy local taxes for benefits conferred, as demonstrated under Point I hereof, there is nothing in the Charter which specifically prescribes the method by which such powers shall be exercised, unless it be that the provisions of Charter Section 5-1 incorporate the procedures prescribed by general law as argued under Point III hereof. In fairness it must be conceded that there is much force to the argument that bonding procedures and taxing procedures are separable, and that the city could follow the general law as to bonding procedures while providing by charter or ordinance a procedure for levying special taxes which differed substantially from the procedures set up by general law, so long as the prescribed taxing procedures resulted in a levy effective before the bonds are to be issued. The fact that Charter Section 5-1 mentions special improvement district bonds, without mentioning special improvement district assessments would lend some force to an argument that such was the intention of the charter draftsmen. More-

over, it will be recalled that Section 1-3 of the Charter, by which the city in effect accepts all powers which have been or could be granted to the city, specifically provides that **'all such powers shall be exercised in the manner prescribed in this Charter, or if not prescribed herein, in such manner as shall be provided by ordinance."** It must be conceded that reading all provisions together it might very properly be held that the framers of the Charter intended that the Provo City Council should by ordinance prescribe the method by which special improvement districts should be created and special improvement taxes and assessments levied preparatory to the issuance of special improvement bonds. This problem is discussed in

> McQuillan on Municipal Corporations,
> Third Edition, Sections 10.29 and 10.30.

In the latter section the author says:

> "But where the provision is merely a grant of power, as authority to license and regulate trades . . . . to make public improvements . . . . the passage of proper ordinances or resolutions is required to make the power effective."

And in the first section mentioned the eminent author says:

> "If power is conferred on a municipal corporation by statute and the law is silent as to the mode of exercising such power, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such powers shall be exercised; all the reasonable methods of executing such power are inferred, subject, however, to the limitation that the action taken must be in good faith and neither arbitrary or capricious. The general presumption obtains,

if nothing to the contrary appears, that that which was done was proper and valid."

Thus it may very well be that while Provo City has power to create special improvement districts, construct improvements therein and levy special taxes to finance the same, that power must be implemented by a general ordinance adopted pursuant to Section 1-3 of the Charter prescribing the method by which such powers shall be exercised, which ordinance must then be followed.

In analyzing the situation with which the cititzens of Provo are confronted, it appears that there are four possible interpretations of the purpose and intent of the Constitution and the Charter provisions:

(1) By Charter Section 5-1, not only the general law relating to special improvement district bonds, but also the general law relating to special improvement district contracts and taxes, as an integral part of the bonding procedure, was adopted by reference, and Charter Section 6-16 has no application thereto, as argued under Point III, supra.

(2) Charter Section 5-1 adopts only special improvement district bonding procedures without adopting general procedures for special improvement districts, contracts and taxes, and the latter power must be implemented by an ordinance prescrbing the method, but, nevertheless, Charter Section 6-16 has no application to contracts made for improvements to be financed by special improvement taxes.

(3) Charter Section 5-1 adopts not only special improvement bonding procedures but also procedures for special improvement districts, contracts and taxes, but the framers of the Charter intended Charter Section 6-16 to

apply as a further limitation on the procedure to be followed in Provo City.

(4) Charter Section 5-1 does not adopt procedures provided by general law for special improvement districts, contracts and taxes, and the city's powers in that regard must be implemented by ordinance, which ordinance must require compliance with the provisions of Charter Section 6-16.

The first possibility was discussed under Point III, supra. However, even if the Court should not rule in defendants' favor pursuant to the arguments there submitted, the City, nevertheless, can proceed in accordance with the Court's direction to comply with ay of the other requirements, and any writ issued hereunder should be conditional and should by its own terms terminate when the city has complied with the proper requirements. Let us consider briefly each of the remaining three alternatives and show how the city can comply with them and exercise its undoubted powers to construct local improvements.

As to alternative number (2), if the Court should believe that the power to create special improvement taxes must be implemented by an ordinance prescribing the method for the exercise thereof but that Charter Section 6-16 has no application to contracts for the construction of improvements to be financed by special improvement taxes, as distinguished from general obligation or revenue bonds, as argued under Point III, supra, then the writ of the Court might issue prohibiting the City from proceeding until it had enacted an ordinance prescribing the method by which the power to create improvement districts and levy special improvement taxes, at which time the writ should expire by its own terms.

In such event the City could by ordinance either (a) adopt the procedures prescribed by general law relating to special improvement districts and taxes, or (b) by ordinance prescribe any other reasonable and constitutional procedure relating to the creation of special improvement districts and the assessment of special improvement taxes. After such ordinance had been adopted the City could proceed in accordance with such ordinance, and when the tax had been levied it could either issue bonds against the taxes or pay for the improvements directly by the taxes without issuing bonds in anticipation thereof. To us this seems entirely logical, and in full accord with the obvious purpose and intent of the Constitution and Charter as framed.

Now, as to the third alternative, if the Court should be of the opinion that special improvement district bonding procedures and special improvement taxing procedures prescribed by general law are an integral and inseparable part of the bonding procedures which have been incorporated in the Charter by Charter Section 5-1, and that the Charter framers also intended the provisions of Charter Section 6-16 to apply to special improvement district contracts as well as other contracts, then, of course, no implementing ordinance prescribing procedure would be necessary. However, in order to comply with the provisions of Charter Section 6-16, the City would be required to enact its bond ordinance in advance of, and prior to the time it executed the construction contract. There is nothing in the general law of Utah relating to special improvement district bonds forbidding such a procedure, and the City can and will comply therewith if so required. In this connection, the Court's careful attention is directed to the provisions of Section 10-7-63, Utah Code Annotated, relating to the procedures for

issuing special improvement district bonds. That section provides as follows:

> "In any instance where a city or town may levy a special tax or assessment for the purpose of making or paying for any local improvement the City Auditor in cities having an auditor, the City Recorder in cities not having an auditor, or the Clerk of the Board of Town Trustees, upon being so directed by the governing body, shall fifteen days after the levy of such tax or assessment becomes effective issue warrants or bonds in payment of the cost and expense of such local improvements against the funds created by such special tax levy or assessments . . . ."

There follows specific provisions as to the designation, amounts, denominations, payment dates, rates of interest, etc., of the bonds. It is to be noted that the bonds cannot be "issued" until fifteen days after the tax has been levied. **But it must also be noted that there is no specification as to the time when the municipilities' governing body may issue its direction that the bonds shall issue fifteen days after the tax levy.** Indeed, the mechanics of the situation would seem to require that the direction for the issuance of the bonds be made sometime prior to the fifteenth day after the ordinance levying the tax shall be effective. If it be objected that the total amount of the bond issue cannot be determined until the fifteenth day after the tax is levied because of the right given by statute to the taxpayers to prepay their assessment without interest at any time within the fifteen day period, this objection can be easily and logically met by a provision in the bonding ordinance prescribing the exact mathematical formula by which the the administrative officer shall compute the exact amount

of the bonds to be issued. By this formula the amount of the bond issue would be the total amount of the special improvement taxes levied to defray the costs of the improvement (as the same would be determined by the tax ordinance) less that portion of the total amount of said taxes paid to the Finance Officer within fifteen days after the effective date of the tax ordinance. The ordinance can prescribe the number of years over which the bonds shall be payable and fix the amount of interest and direct that the Finance Officer issue them in the denominations required by Section 10-7-63, which gives detailed instructions in that regard. Thus the Provo City Council could, in advance of letting the construction contract, pass the bond ordinance which would, when read in connection with the tax ordinance to be enacted, fix exact procedures and amounts, and all that would be left to the Finance Officer would be mathematical computations of subtraction and division. These computations are, of course, purely ministerial and are commonly performed by administrative officers for the municipal legislative bodies. There is no reason why the bond ordinance should not leave such mathematical computations as to the amount of the bonds and the denominations in which they are to be issued pursuant to statute up to a ministerial officer.

Thus Provo City can comply with the requirements under this possible alternative, and should be given an opportunity to do so if the Court decides that such is the proper interpretation of the law.

Finally, as to the fourth alternative, if this Court should indicate in its opinion that procedures prescribed by general statute for the creation of the special improvement district and the levying of the special improvement tax are

not adopted as an integral part of the bonding procedures, so that an ordinance prescribing such procedures must be adopted to implement the power granted, and should further indicate that the provisions of Charter Section 6-16 must also be met in the procedures to be adopted, still Provo City can meet the requirements so prescribed and should be given an opportunity to do so, first by passing an implementing ordinance prescribing the procedures for establishing and taxing the district, and second, by passing the bond ordinance in advance of the letting of the contract. Indeed, in such case the implementing ordinance as to procedures for establishing and taxing the district can specifically provide that the bond ordinance shall be adopted prior to the letting of the contract.

In the event the Court should adopt any of the views discussed under this Point IV, then any writ issued by the Court should be conditional and should terminate by its own terms as soon as Provo City has proceeded in accordance with the procedures which the Court has determined to be the proper and legal procedures intended by the framers of the Provo City Charter.

CONCLUSION

It is submitted that Provo City clearly has the power under the Constitution and under its Charter to create special improvement districts, to levy special improvement taxes, to pay the cost of local improvements within such districts, and to issue special improvement district bonds as provided by general law against such special improvement taxes when levied. Under any possible interpretation of the Charter there is some legal means by which the City can exercise

these powers, and it remains only for the Court to indicate which procedure is the lawful one to be followed.

It is believed and respectfully submitted that the proper interpretation is that advanced under Point III, and that the temporary writ issued herein should be recalled as the City is proceeding properly. If, however, the Court should be of the opinion that one of the methods discussed under Point IV hereof is the lawful method, then the City should be granted ample opportunity to comply with the requirements in the exercise of its undoubted power.

Respectfully submitted,

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